Cera International Corporation *and* Shopmen's Local Union No. 508, International Association of Bridge, Structural and Ornamental Iron Workers, AFL-CIO. Case 7-CA-18319

June 30, 1982

DECISION AND ORDER

BY CHAIRMAN VAN DE WATER AND MEMBERS FANNING AND ZIMMERMAN

On February 5, 1982, Administrative Law Judge Robert W. Leiner issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge and to adopt his recommended Order,[2] as modified herein.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Cera International Corporation, Plymouth Township, Michigan, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Substitute the following for paragraph 2(a):

"(a) Offer Robert L. Whitney immediate and full reinstatement to his former job as welder or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and make him whole for any loss of pay he may have suffered due to the discrimination practiced against him by payment to him of net backpay in accordance with the provisions described in the section of this Decision entitled 'The Remedy.'"

2. Insert the following as paragraph 2(c) and reletter the subsequent paragraphs accordingly:

"(c) Expunge from its files any reference to the discharge of Robert L. Whitney on September 23, 1980, and notify him in writing that this has been done and that evidence of this unlawful discharge will not be used as a basis for future personnel actions against him."

3. Substitute the attached notice for that of the Administrative Law Judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT warn employees to cease engaging in activities in support of or threaten employees with retaliation or "drastic" action against them if they refuse to cease engaging in activities in support of Shopmen's Local Union No. 508, International Association of Bridge, Structural and Ornamental Iron Workers, AFL-CIO, or any other labor organization.

WE WILL NOT discharge or otherwise unlawfully discriminate against any employee because of his activities in support of, his membership in, or his sympathy for the above-named labor organization, or any other labor organization.

WE WILL offer Robert L. Whitney immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and WE WILL make him whole, with interest, for any loss of pay he may have suffered by reason of our unlawful discrimination against him.

WE WILL expunge from our files any reference to the discharge of Robert L. Whitney on September 23, 1980, and WE WILL notify him in writing that this has been done and that evidence of this unlawful discharge will not be used as a basis for future personnel actions against him.

CERA INTERNATIONAL CORPORATION

DECISION

STATEMENT OF THE CASE

ROBERT W. LEINER, Administrative Law Judge: This matter was heard in Detroit, Michigan, on September 8, 1981, pursuant to a complaint, amended at the hearing, and a notice of hearing issued on November 6, 1980, by

[1] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

[2] Respondent's request for oral argument is hereby denied as, in our opinion, the record in this case, including the exceptions and brief, adequately presents the issues.

the Regional Director for Region 7 of the National Labor Relations Board. The amended complaint, alleging violations of Section 8(a)(1) and (3) of the National Labor Relations Act, herein called the Act, is based upon a charge of unfair labor practices filed on September 29, 1980, by Shopmen's Local Union No. 508, International Association of Bridge, Structural and Ornamental Iron Workers, AFL-CIO, herein called the Union, and thereafter served October 1, 1980, on Cera International Corporation, herein called Respondent. Respondent, by its amended answer, admitted, *inter alia*, the Board's jurisdiction and both the supervisory and agency status of certain alleged employees, but denied commission of unfair labor practices.

At the hearing, the parties were accorded full opportunity to introduce relevant evidence, examine and cross-examine witnesses, argue on the record, and file post-hearing briefs. The General Counsel argued on the record after the conclusion of the testimony and Respondent filed a timely brief. Based upon the entire record in this case, including the argument and brief, and upon my observation of the demeanor of the witnesses as they testified, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Respondent, a Michigan corporation engaged in the manufacture and sale of central coolant filtration systems, parts, and related products, maintains its office and place of business at Eckles Road, Plymouth Township, State of Michigan. During the calendar year ending December 31, 1979, a representative period of its business operations, Respondent, in the course and conduct thereof, manufactured, sold, and distributed at its Eckles Road plant, products valued at in excess of $50,000 which were shipped from said plant directly to points located outside the State of Michigan. Respondent admits, and I find, that at all material times, it has been and is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE UNION IS A LABOR ORGANIZATION

The complaint alleges and Respondent admitted at the hearing that Shopmen's Local Union No. 508, International Association of Bridge, Structural and Ornamental Iron Workers, AFL-CIO, the Union herein, is a labor organization within the meaning of Section 2(5) of the Act. I so find.

III. THE ALLEGED UNFAIR LABOR PRACTICES

Robert L. Whitney, the alleged discriminatee herein, hired by Respondent on September 11, 1979, and discharged December 3, 1980, was employed as a welder. Respondent employs about 30 production and maintenance employees at its Eckles Road plant.

Sometime in July 1980, Whitney begun urging his fellow employees to introduce a union into the shop because of alleged low wages and poor benefits. He spoke to them principally during nonwork time, or lunch and at breaks. He estimates that he spoke to a large majority of the 25 to 30 production employees. On one occasion, while he was at his workplace, Respondent's supervisor, Marty Williams, approached him to inspect a piece of his work. Whitney asked Williams what he thought of a union coming into the shop. Williams answered that it made no difference to him one way or the other because Williams was leaving the shop floor and would thereafter soon be working in the office.

In support of his desire to bring a union into the shop, Whitney contacted his old union, Local 508, and spoke with Business Manager Vernon Harris. When Whitney told Harris of the alleged poor working conditions, including the failure to get raises and the need for representation, they then sought to set up an appointment for Harris to come out to the plant and visit with the employees. Although Whitney told his coemployees of his visit to Business Manager Harris and the results of those conversations, Whitney nevertheless went on vacation in the last week of August when Harris and three other union agents actually visited the plant.

While Whitney was speaking to his coemployees about the wisdom of getting a union into the shop and telling them of arrangements for the Union to come out and visit them, he mentioned this to coemployee Gary Litton. About this time, sometime in August 1980, Respondent's plant manager and superintendent, Gerald F. Duff, spoke to Litton at Litton's workplace. Duff told Litton that another (unnamed) employee told Duff that Litton was influencing the people to join the Union and Duff told Litton that if Litton continued to do it, Litton would be "in trouble." Duff told Litton that the Company was not making any money yet, was a new company, and that a union was not good for the company.

The General Counsel alleges, in his amended complaint, that by this conduct, plant manager Duff unlawfully threatened an employee that he should not talk about the Union. Notwithstanding that Duff, in general terms, denied Litton's testimony, I credit Litton. Litton was employed by Respondent at the time of his testimony and I believe that this is a case where special deference ought to be owed on the basis of that fact. See *Georgia Rug Mill Co.*, 131 NLRB 1304, 1305, fn. 1 (1961). Furthermore, I was impressed by Litton's particular recollection of the events of the conversation and I was not impressed by Duff's generalized denial, in surrebuttal, that the conversation did not take place. I therefore conclude that Duff, in or about August 1980, unlawfully warned employee Gary Litton to refrain from engaging in union activities with coemployees in violation of Section 8(a)(1) of the Act.

Thereafter, as above noted, in late August 1980, while Whitney was away on vacation (which vacation ended on or about the first day of September 1980), Vernon Harris, union business manager, and three other union agents, came out to Respondent's plant sometime between 10 a.m. and noon and, without receiving Respondent's permission, entered into Respondent's plant, and distributed union membership cards, on working time, to employees at their workplaces. While they were passing out the cards, Duff approached them, asked what were they doing there, and threatened to have them "locked

up" if they did not get off private property. After telling Duff that it was none of his business what they were doing with the employees, they left at his request and he again threatened to have them "locked up" if they ever returned. After the union distributed the cards, more than a dozen of the blank union cards were either given to Duff or left on his desk, by employees, all of the cards being unsigned.

One day after the distribution of the cards, Duff told employee Gary Litton that: (a) the Union was not good for the Company which was a new company because the Company did not have the money to afford a union and (b) that a Union would break the Company. Thereafter, before September 23, 1980 (the day Whitney was admittedly discharged), Gary Litton was in Duff's office on a job-related matter. Duff told him at that time, that he, Duff, did not ". . . believe you're the one who instigated the union to come in. When we [find] out who was the instigator, the company would do something drastic." Duff told Litton that the Company was too new to have a union and the union would break the Company. To the extent that Duff denied Litton's testimony, I do not credit Duff's denial. I credit Litton. As above noted, I was impressed not only by Litton's particularization of the events, their timing, and the place in which they occurred, but by Litton testifying directly in the face of his current employer concerning the employer's hostility to the Union and conduct amounting to the employer's hostility to the Union and conduct amounting to unfair labor practices. Litton has no known stake in this litigation.

When Whitney returned from vacation, he signed a union card on September 2, 1980. He then telephoned Harris to see how many cards were signed and Harris told him that there were only four. Harris told him to see if he could get more cards signed. Whitney went back to the employees, telling them of a lack of pay raises and asked them to sign enough cards to petition the National Labor Relations Board, apparently for an election. This was in the first week of September 1980.

Shortly after this, in or about mid-September 1980, Whitney was in Duff's office (about 1 week before he was discharged) and told him of his need for money because his daughter was in college and his son was taking expensive music lessons. He asked Duff when they might expect a raise and Duff said that since Respondent was first breaking even and showing no profit, no raises could be expected at that time. Whitney then told Duff that most comparable union shops in the area were making about $2 an hour more than Respondent's employees and that Respondent's pay scale was low. When Duff told Whitney that he was against unions, Whitney said that unions support the men, that the men depended on them to work out problems without the men being fired and that a union gets the employees benefits and sometimes pay raises. Duff responded by saying that in the old days, without unions, there were no problems that they have now and that unions were troublemakers. This Whitney testimony, undenied by Duff, is credited.

The Events of September 23, 1980

Within about 10 minutes of quitting time (5.30 p.m.) on September 23, 1980, a Tuesday,[1] Duff approached Whitney with three checks, all of which were paychecks. He told Whitney that he "hated to do this," but that he would have to "let you go." Duff added: "I think you know the reason why." Duff admitted so much of Whitney's testimony.

Whitney further testified that he then picked up his tools, placed them in his toolbox, and went into the company office to seek an explanation as to why he was fired. He spoke there to Supervisor Marty Williams and told him that he had just been fired. When Williams said that he had just heard about it a few minutes before, Whitney asked whether it was because Whitney had been sick for 2 days. Marty Williams answered that he did not know if it were due to the sickness. Whitney then asked whether it was because he was trying to bring a union into the shop. Marty Williams answered: "That's the only reason I can think of. Go speak to Duff." Marty Williams did not testify on Respondent's behalf and his failure to do so was not the subject of further explanation. I therefore credit Whitney's undenied and otherwise unexplained testimony regarding his conversation with Supervisor Marty Williams and Williams' statement: "That's the only reason I can think of."

Duff denies the following Whitney testimony. Following Supervisor Williams' direction, Whitney then went to see Duff and asked Duff why he was fired. Duff said "You know" and, when Whitney denied knowledge, Duff allegedly answered that 10 employees had come into his office and told him that Whitney had been "influencing" them. Duff allegedly told Whitney: "We can't have that around here. You are a bad influence on the Company. I'll give you a good recommendation [for another job]. If you want unemployment compensation, you can have it." At that point, according to Whitney, Duff raised his hands and said: "I've said too much now. I can't anymore."

Aside from Duff denying Whitney's testimony concerning this alleged post-discharge office conversation with Duff, Duff gave a different version and testified that commencing in or about August of 1980, he could not find Whitney when he needed him and often "caught him" with groups of men, talking to them. Although Duff admitted that Whitney was a good welder with slow but unobjectionable production, he said that Whitney daydreamed a lot, and that he often saw him talking to groups of employees during working hours and on working time. I find this testimony, if true, to be unpersuasive concerning the cause of discharge.

Duff testified that Respondent's wages and holidays were on a par with union shops in the area and denied any knowledge of Whitney's union activities. Duff pointed to the fact that Gary Litton, whom he considered prominent as a union organizer, was still working for the Company, still organizing on behalf of the Union. Duff testified that he really discharged Whitney not because

[1] Payday is Friday of each week, and the pay covers a pay period of the preceding Monday through Sunday.

of his low output, but because of his "bad attitude," particularly his roaming around the plant talking to other employees; that he would often tell Whitney that he was not on the job and asked him whether he was sick or not. He said that Whitney, with humility, merely shrugged his shoulders and give a mild answer. Whitney allegedly would say that it would never happen again.

Duff testified that Respondent's original work force was unstable but in the 9-month period preceding this discharge, the work force had become stable and not a single employee was discharged.

Whitney, in rebuttal, contradicted Duff and testified that he had never received a warning of any kind concerning his job security, his poor work, or poor attitude. I credit him. Gary Litton testified, for instance, that Duff or one of the foremen would sometimes find employees waiting to use a machine and think that they were wasting time. He would tell them to get to work and not wait at the machine when there was other work to be done. Litton testified that he had never heard a threat of discharge for this conduct. Litton testified, further, that he was familiar with Whitney's work and never heard a complaint concerning that work or any suggestions from Duff that Whitney was not working hard on the job or that he was wandering around. In any event, he never heard a threat uttered against Whitney.

Lastly, Duff testified that he never knew that Whitney was an organizer for the Union but rather thought that it was Litton. Duff testified that he never told Whitney (when Whitney was discharged) that he was discharged for union activity and said that he was too experienced a management representative to make such a statement. Whereas Duff testified that he cautioned Litton to perform his union activities on his own time and not on worktime, Litton credibly testified that there had never been any such warning. It is unnecessary to resolve the conflicting Duff-Whitney testimony regarding what Duff told Whitney in Duff's office during the post-discharge interviews of September 23. The other evidence of record (especially Whitney's undenied Williams' conversation) leads to a conclusion that a preponderance militates in favor of a finding that the discharge violated Section 8(a)(1) and (3) of the Act.

Discussion and Conclusions

1. Whereas Duff denied making any threat to Gary Litton, I have concluded that Litton, a present employee, was to be credited over Duff's denial that such a threat to Litton for engaging in union activity was indeed made in late August, after the union cards were distributed by Vernon Harris and his coworkers at the union.

2. I also find significant that Supervisor Marty Williams was not called to deny Whitney's credible testimony concerning the motive for Whitney's discharge ("That's the only reason I can think of") made within a few minutes of Duff having discharged Whitney. Such undenied testimony binds Respondent and directly undermines Duff's assertions that Whitney was discharged for a poor attitude of some kind including walking around the shop in a daydream and not attending to business. This also supports Litton's testimony that no threat or warning concerning Whitney's alleged misconduct on the shop floor was ever heard or certainly taken seriously by Williams who was a supervisor.

3. Respondent's answer affirmatively pleads (p. 3) that on the day of the discharge, Respondent had a "rush job to be filled" upon which Whitney ". . . was supposed to be working and superintendent Gerald Duff could not find him on the job where he was suppose to be." Although Duff was on the witness stand in defense and in surrebuttal, he in no way supported such an assertion. There was no proof or even testimony regarding any rush job in the performance of which Whitney was delinquent. Such alleged specific Whitney misconduct is not clearly consistent with Whitney's alleged generalized daydreaming. Nor is it consistent with Duff's admission that Whitney was a good, if slow, welder. Nor does it support the reason Duff advanced for the discharge at the hearing. Thus, Respondent failed to support a pleaded defense.

4. My overall impression of Duff's denials and explanations is that these explanations and denials were halfhearted. In comparison to the detailed and specific testimony of Whitney and Litton, Duff gave a rambling account of Whitney's supposed daydreaming over a period of time which caused Duff to become so exasperated that, suddenly, in the middle of the pay period, he discharged Whitney peremptorily for longstanding, preexisting reasons. I conclude, in conformity with Whitney's testimony as supported by Litton, that Whitney was never warned about any alleged poor or slow work or daydreaming. Thus, even without crediting Whitney in his post-discharge interview with Duff—which the circumstances reasonably demand—Respondent's unlawful motivation is apparent.

Under the rule of *Wright Line, a Division of Wright Line Inc.*, 251 NLRB 1083 (1980), the General Counsel has proved a strong *prima facie* case when the credited testimony shows that Whitney was openly engaged in union activities among many of his coemployees in Respondent's plant commencing in late August; that after the distribution of union cards in the plant, Respondent made an unlawful warning to Gary Litton to cease engaging in activity; and, moveover, threatened that when the *source of* the organizational effort was discovered, Respondent would do something "drastic." The "source," on this record, was Whitney. The predicted "something drastic" was Whitney being discharged.

On the day of his discharge, there is undenied testimony (apart from Duff's alleged admissions to Whitney in the post-discharge interview) which makes Respondent's motive overtly unlawful: Supervisor Marty Williams' statement that the discharge, for union activities, was ". . . the only reason I can think of." Without even resolving the credibility issue of what Duff allegedly said to Whitney in Duff's office immediately thereafter, I would conclude that the evidence sufficiently proved a *prima facie* case especially in view of the fact that Whitney was peremptorily discharged in the middle of a pay period and Duff admitted that the quality of Whitney's work was good and that no employee in that stable workforce had been discharged for 9 months.

Under *Wright Line*, the General Counsel having proved a *prima facie* case, the burden of proof then shifts to Respondent to prove that the reasons for the discharge upon which Respondent relies would have supported Respondent totally apart from the facts adduced by the General Counsel in support of the *prima facie* case. I have not found that Whitney engaged in any daydreaming of loafing as alleged by Respondent. Moreover, Respondent's pleaded defense that the precipitating cause of the discharge, Whitney's alleged delinquent failure to work on a "rush job" was totally unsupported by any proof. I therefore conclude that Respondent has failed to support its defenses, if any. I further conclude, on the basis of all the evidence, that Respondent discharged Whitney because of his activities on behalf of and in support of the Union among the coemployees commencing August 1980. Thus, I find that his discharge of September 23, 1980, violated Section 8(a)(3) and (1) of the Act, as alleged. That Respondent kept Gary Litton in employment notwithstanding it regarded Litton, not Whitney, as the chief union proponent is not dispositive. Not only was Respondent's alleged perception of Litton inconsistent with the record facts, but, even if true, would not be a defense under the facts as found to its discharge of Whitney.[2]

CONCLUSIONS OF LAW

1. Cera International Corporation is an employer within the meaning of Section 2(2), (6), and (7) of the Act, and Local No. 508 is a labor organization within Section 2(5) of the Act.

2. Respondent, by threatening employees in August 1980 that it would do something "drastic" if it discovered the union instigator and that an employee should cease "influencing" employees to join the Union, made unlawful warnings and threats of unlawful retaliation in violation of Section 8(a)(1) of the Act.

3. By discharging Robert L. Whitney, on or about September 23, 1980, because of his membership in and activities in support of the Union herein, Respondent, by discrimination, discouraged membership therein, and thereby violated Section 8(a)(3) and (1) of the Act.

4. The unfair labor practices of Respondent have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow thereof.

THE REMEDY

In order to effectuate the policies of the Act, it will be recommended that Respondent cease and desist from the above unfair labor practices and that it be ordered to offer full and immediate reinstatment to Robert L. Whitney to his old or substantially equivalent employment, and to make him whole for any loss of earnings he may have suffered by reason of his being unlawfully discharged on September 23, 1980, by payment to him of net backpay computed in accordance with *F. W. Woolworth, Company*, 90 NLRB 289 (1950), and *Florida Steel Corporation*, 231 NLRB 651 (1977).[3]

Upon the foregoing findings of fact and conclusions of law, and pursuant to Section 10(c) of the Act, I issue the following recommended:

ORDER[4]

The Respondent, Cera International Corporation, Plymouth Township, Michigan, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Warning employees to cease, and threatening employees with retaliation if they refuse to cease, engaging in activities supporting Shopmen's Local Union No. 508, International Association of Bridge, Structural and Ornamental Iron Workers, AFL-CIO, or any other labor organization.

(b) Discharging, or otherwise unlawfully discriminating against, any employee, because of his membership in, support of, or sympathy for the above-named Union, or any other labor organization.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Offer to Robert L. Whitney immediate reinstatement to his old job as welder or, if such job no longer exist, to substantially equivalent employment, and make him whole for any loss of pay he may have suffered by payment to him of net backpay in accordance with the provisions described in the section of this Decision entitled "The Remedy."

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Post at its place of business copies of the attached notice marked "Appendix."[5] Copies of said notice, on forms provided by the Regional Director for Region 7, after being duly signed by authorized representative, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

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[2] Litton credibly testified that Duff told him that he (Duff) did not believe it was Litton who instigated to get the Union in.

[3] See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

[4] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[5] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(d) Notify the Regional Director for Region 7, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.